

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Judiciary Committee

BILL: SB 2248

INTRODUCER: Senator Negron

SUBJECT: Government Liens

DATE: March 25, 2010

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Treadwell	Maclure	JU	Pre-meeting
2.			CA	
3.			BI	
4.			FT	
5.			WPSC	
6.				

I. Summary:

The bill makes several changes to statutes applicable to governmental liens to facilitate the collection and notice of these liens.

More specifically, the bill requires that all governmental liens – excluding ad valorem taxes, special assessments collected using the uniform method, and liens for utility services – are to be recorded in the official records before the liens are binding as to subsequent interests acquired for value. The bill expands the authority of local governments to enter onto property, make emergency repairs, and to make special assessments as to the costs of these repairs. These assessments will receive the same priority as ad valorem taxes, will attach notwithstanding homestead status, and will not be eliminated in foreclosure.

The bill also expands the current mechanism for determining the applicability of available homestead protections under existing law.

This bill substantially amends the following sections of the Florida Statutes: 162.03, 162.06, 162.07, and 162.09. The bill creates sections 162.091 and 162.14, Florida Statutes. The bill also amends and redesignates section 62.09(3) as section 162.092, Florida Statutes.

II. Present Situation:

Local Government Code Enforcement Boards

The Local Government Code Enforcement Boards Act was enacted by the Legislature to promote, protect, and improve the health, safety, and welfare of the citizens of the counties and

municipalities of the state by authorizing the creation of administrative boards with authority to impose administrative fines and other noncriminal penalties.¹ Further, the purpose is to provide an equitable, expeditious, effective, and inexpensive method of enforcing any codes and ordinances in force in counties and municipalities where a pending or repeated violation continues to exist. Each county or municipality may, at its option, create or abolish by ordinance local government code enforcement boards as provided by the statute.² However, charter and noncharter counties, or a municipality may, by ordinance, adopt an alternate code enforcement system that gives code enforcement boards or special magistrates designated by the local governing body, or both, the authority to hold hearings and assess fines against violators of the respective county or municipal codes and ordinances.³

Upon notification by the code inspector that an order of the enforcement board has not been complied with by the set time, or upon finding that a repeat violation has been committed, the enforcement board may:

- Order the violator to pay a fine, set by statute, for each day the violation continues past the date set by the enforcement board for compliance; or
- In the case of a repeat violation, order the violator to pay a fine for each day the repeat violation continues, beginning with the date the repeat violation is found to have occurred by the code inspector.⁴

In determining the amount of the fine to be imposed, the enforcement board must consider:

- The gravity of the violation;
- Any actions taken by the violator to correct the violation; and
- Any previous violations committed by the violator.⁵

If the violation is a violation described by statute, the enforcement board is required to notify the local governing body, which may make all reasonable repairs that are required to bring the property into compliance and charge the violator the amount of the reasonable cost of the repairs, in addition to the fine imposed by statute.⁶

¹ Section 162.02, F.S.

² Section 162.03(1), F.S.

³ Section 162.03(2), F.S. The powers afforded to code enforcement boards “do not unconstitutionally cross the line between quasi-judicial and judicial authority because such boards may impose fines for code violations, but they cannot impose criminal penalties, and because the statute permitting the boards to assert a lien against real or personal property provides the fundamental due process requirements of notice and a hearing, making of a record, and appeal.” 12A FLA. JUR 2D *Counties, Etc.* s. 81(citing *Michael D. Jones, P.A. v. Seminole County*, 670 So. 2d 95 (Fla. 5th DCA 1996)).

⁴ Section 162.09(1), F.S.

⁵ Section 162.09(2)(b), F.S.

⁶ Section 162.09(1), F.S. The provisions of s. 162.07(2), F.S., which authorize the recovery of all costs incurred by a municipality in prosecuting a violator before a code enforcement board, do not authorize the board to award attorney’s fees incurred in the prosecution, whether those fees are incurred directly or indirectly. 12A FLA. JUR 2D *Counties, Etc.* s. 81 (citing *Op. Att’y Gen. Fla. 2009-7 (2009)*).

Violations Threatening Public Health, Safety, and Welfare

With the influx of foreclosures in Florida, local governments are facing increasing difficulties with hazards and maintenance issues associated with vacant, unmaintained, and unsecured properties.⁷ Under Florida law, if the code inspector has reason to believe a code violation presents a serious threat to public health, safety, and welfare, the code inspector must make a reasonable effort to notify the violator and may immediately notify the enforcement board and request a hearing to address the violation.⁸

If such a violation occurs, the enforcement board must notify the local governing body, which may make all reasonable repairs that are required to bring the property into compliance, and may charge the reasonable costs associated with the repairs to the violator.⁹ If the enforcement board performs these repairs or otherwise maintains the property, there is no duty on the part of the local governing body to make further repairs or to maintain the property.¹⁰ Furthermore, the repairs and maintenance do not create any liability against the local governing body for any damages to the property, provided that the repairs were made in good faith.¹¹

Liens for Fines and Repair Costs

Current law provides that a fine or a fine plus costs of repair may be recorded in the public records and will constitute a lien against the land on which the violation exists, as well as upon any other real or personal property owned by the violator.¹² Upon petition to the circuit court, an order will be enforceable in the same manner as a court judgment by the sheriffs of this state, including execution and levy against the personal property of the violator.¹³ However, the order is not deemed to be a court judgment except for enforcement purposes under current law.¹⁴ A lien arising from a fine imposed runs in favor of the local governing body, and the local governing body may execute a satisfaction or release of lien entered.¹⁵ After three months from the date of filing of the order, the enforcement board may authorize the attorney for the local governing body to foreclose on the lien or to sue to recover a money judgment for the amount of the lien plus accrued interest. However, existing law provides that the lien may not be foreclosed on real property that is deemed a homestead.¹⁶ These liens expire 20 years after the certified copy of an order imposing the lien was recorded, unless within that time, an action is commenced in court.¹⁷

⁷ The Real Property, Probate, and Trust Law Section of the Florida Bar, *White Paper: Fair Notice of Governmental Liens*, 1 (2010) (on file with the Senate Committee on Judiciary).

⁸ Section 162.06(4), F.S.

⁹ Section 162.09(1), F.S.

¹⁰ *Id.*

¹¹ *Id.*

¹² Section 162.09(3), F.S.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*; see also FLA. CONST. art. X, s. 4.

¹⁷ Section 162.10, F.S.

Designation of Homestead Before Levy

Under Florida law, when a certified copy of a judgment has been filed in the public county records, a person who is entitled to a constitutional homestead exemption under the Florida Constitution and who has a contract to sell, or a commitment from a lender for a mortgage on the homestead, may file a notice of homestead in the public records of the county in which the homestead property is located.¹⁸ The clerk must mail a copy of the notice of homestead to the judgment lienor and to any other person designated in the most recent recorded judgment or accompanying affidavit to receive the notice of homestead, and certify that service was made.¹⁹

Recording Conveyances

No conveyance, transfer, or mortgage of real property, or of any interest to the property, nor any lease for a term of one year or longer, will be good and effectual in law or equity against creditors or subsequent purchasers for a valuable consideration and without notice unless the same is recorded according to law.²⁰ Similarly, “in order for any such instrument, if executed by virtue of a power of attorney, to be effective against creditors or subsequent purchasers for value without notice, the power of attorney must be recorded before the accruing of the right of that creditor or subsequent purchaser.”²¹ Grantees by quitclaim are deemed and held to be bona fide purchasers without notice within the meaning of the recording acts.²²

Fair Notice of Governmental Liens

According to the Real Property, Probate, and Trust Law Section of the Florida Bar (RPPTL Section), liens assessed and maintained by a municipality or branch of a municipality often go undetected because:

- They are often unrecorded;
- Confusion often arises over determination of which branch of government has the right to impose the lien; and
- Confusion arises as to whom to contact to determine the existence of possible liens.²³

The RPPTL Section performed an unscientific poll of local governments and determined that only 60.8 percent of the responding local governments recorded all of their liens in the official county records.²⁴

These liens often go undetected and unpaid for extended periods and through successive mortgages and transfer of ownerships. As a result, the burden of such liens may unfairly fall on

¹⁸ Section 222.01(2), F.S. A form for providing notice of homestead is provided in statute. *See also* 28A FLA. JUR 2D *Homesteads* s. 55.

¹⁹ Section 222.01(3), F.S.

²⁰ Section 695.01(1), F.S.

²¹ 44 FLA. JUR 2D *Records and Recording Acts* s. 145.

²² Section 695.01(2), F.S.

²³ The Real Property, Probate, and Trust Law Section of the Florida Bar, *supra* note 7, at 1.

²⁴ *Id.* at 1.

innocent purchasers of property. Non-recorded liens are not typically covered by Florida title insurance policies, except in rare instances.²⁵

III. Effect of Proposed Changes:

The bill makes several changes to statutes applicable to governmental liens to facilitate the collection and notice of these liens. Following is a section-by-section analysis of the bill:

Section 1. The bill amends s. 162.03, F.S., to clarify that any liens assessed other than by the mechanisms set forth in ch. 162, F.S., (i.e., an alternative ordinance adopted code enforcement mechanism) must be recorded in the county's official records. The bill also specifies that local governments have the authority to adopt ordinances providing that it is a violation of its code for a property owner to fail to repair a property that:

- Falls into disrepair;
- Becomes uninhabitable; or
- Creates a danger to public health, safety, or welfare.

The bill reiterates that procedures for alienation of property and foreclosure of mortgages and liens have been preempted by state statute and court rules and may not be limited or conditioned by local ordinance. The bill expressly provides that these ordinances are void and have no force or effect.

Under the bill, a local government may not require lenders to file or register abandoned, vacant, or foreclosed properties, as well as properties in default.

Section 2. The bill amends s. 162.06, F.S., to clarify that the provisions of this section do not apply when a county or municipal official determines that emergency repairs to property are necessary under s. 162.091, F.S., created by the bill.

Section 3. The bill amends s. 162.07, F.S., to update a cross-reference to s. 162.092, F.S., created by the bill.

Section 4. The bill amends s. 162.09, F.S., to permit a local government official, to whom such authority has been delegated, and after an attempt to notify the owner of record and holder or servicer of any mortgage, to initiate emergency repairs necessary to address a serious threat to the public health, safety, and welfare. The bill also limits the local government's liability for the performance of emergency repairs by excluding any special, punitive, or consequential damages resulting from, or arising in, the cost of the repairs.

The bill provides limitations for the assessments costs of emergency repairs established under s. 162.091, F.S., created under the bill, and specifies that any ordinance assessing the fines and costs must include criteria to be considered by the enforcement board or special magistrate in determining the amount of the fines including:

²⁵ *Id.*

- The gravity of the violation;
- Any actions taken by the violator to correct the violation; and
- Any previous violations committed by the violator.

In addition, the bill specifies that a code enforcement board or a special magistrate may impose a special assessment against the property on which the violation exists to cover all costs incurred by the local government in:

- Making any emergency repairs pursuant to s. 162.091, F.S. (created by the bill);
- Making any repairs ordered by the local governing body or the enforcement board;
- Identifying and notifying the parties to be notified; and
- Recording the copy of the lien and any associated releases.

Reasonable costs relating to enforcement of the violation of codes giving rise to the need for the repairs and costs attributed to making subsequent inspections to confirm completion of the repairs may also be recovered.

The special assessment must be set forth as an amount separate from any fines assessed and must specifically state that the cost assessment portion constitutes a lien on the property equal in priority to real property taxes.

Section 5. The bill amends s. 162.091, F.S., to allow a county or municipal officer to institute any emergency repairs necessary or appropriate to mitigate a violation of the county's or municipality's code of ordinances that presents a serious threat to the public health, safety, or welfare if:

- The code enforcement board is not scheduled to meet within the next 48 hours.
- The local governing body has delegated the authority to institute emergency repairs to that official.
- The code inspector has made a reasonable effort to notify the owner of record of the property on which the violation exists and the holder or servicer of the first mortgage on the property.

Under the bill, the official initiating the emergency repairs must advise the code enforcement board of all costs incurred in making the emergency repairs and any costs of identifying and notifying the parties required to be notified. Thereafter, the board will review the costs, and if it determines that the costs are reasonable under the circumstances, the costs will be assessed.

The bill also limits the liability of the local government with regard to any negligence in the performance of the emergency repairs. The bill specifies that the failure or inability of the official to notify any parties does not invalidate any action or costs incurred in connection with the emergency repairs.

Section 6. The bill redesignates subsection (3) of section 162.09, F.S., as section 162.092, F.S. Under the bill, the local government has the authority to file liens attaching to personal property by filing the liens in the central database of judgment liens maintained by the Department of

State. The bill specifies that the obligation to pay any fines or assessments must be a personal obligation of the owner of the property at the time the owner of the property was notified of the violation and at the time the fine, cost, or fine plus cost was assessed.

The recorded lien must be submitted in substantially the same form and include the specific information and the warning set forth in the bill.

The bill expressly provides that a recorded lien for a cost assessment constitutes a lien on the property equal in priority to real property taxes. The lien is an obligation contracted for the improvement or repair of the property and an assessment within the meaning of the Florida Constitution.²⁶ The lien may be enforced without regard to whether the land on which the violation exists is the homestead of the owner of the property and may not be eliminated by the foreclosure of any mortgage or lien subordinate to real property taxes.

Section 7. The bill creates s. 162.03, F.S., to authorize a code inspector, any government official delegated the authority to make emergency repairs, and any municipal or county employee engaged by the local government to make emergency repairs to enter privately owned properties including, but not limited to, fenced yards, vacant structures, and pool enclosures, for the purposes of making inspections and emergency repairs. An exemption from criminal trespass liability is created in this section for those performing the repairs.

Section 8. The bill amends s. 162.10, F.S., to update cross-references and to clarify that, if a lis pendens is filed in the official records, the lien may not expire within the 20-year limit.

Section 9. The bill amends s. 162.11, F.S., to allow an aggrieved party to appeal a recorded lien.

Section 10. The bill creates s. 162.14, F.S., to provide for severability in the event any portion of ch. 162, F.S., is declared invalid or unconstitutional.

Section 11. The bill amends s. 222.01, F.S., regarding the designation of homestead property to permit non-judicial determinations of homestead exemption to be made as to a code enforcement lien under ch. 162, F.S., other than a cost assessment under s. 162.092(3), F.S., or a notice of lien for any other purpose by any court, governmental, or municipal body. The bill also permits use of this non-judicial determination mechanism by subsequent owners, lienholders, and successors in interest to the party entitled to the homestead protections.

Section 12. The bill amends s. 695.01, F.S., to require all governmental liens on real property – except taxes, special assessments levied and collected under the uniform method described in s. 197.3632, F.S., and liens for utility services – to be recorded in the official records before the governmental lien will be binding upon a lienor or subsequent purchaser for value without notice.

The bill also requires any lien that asserts a priority other than based on its recording order to provide this information on the face of the recorded lien and include a reference to the law

²⁶ See FLA. CONST. art. X, s. 4.

authorizing the priority. These governmental liens may be assigned to third parties who pay the amounts owed.

Section 13. The bill includes language that does not appear to be intended for codification, which provides for severability if any provision of the act is deemed invalid.

Section 14. The bill provides an effective date of July 1, 2010.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

Under the bill, assessments for costs associated with emergency repairs are afforded priority equal to real property taxes. Any change in lien priority (when applied to existing interests such as mortgage interests and liens) may be subject to a constitutional challenge.²⁷

The bill could be interpreted as characterizing the costs incurred by the local government in making emergency repairs as both an assessment and an obligation contracted for repairs. Article X, Section 4(a) of the Florida Constitution provides:

There shall be exempt from forced sale under process of any court, and no judgment, decree or execution shall be a lien thereon, except for the payment of taxes and assessments thereon, obligations contracted for the purchase, improvement or repair thereof, or obligations contracted for house, field or other labor performed on the realty, the following property owned by a natural person. . . .

It is unclear under current law whether the local government emergency repairs could result in an imputed contract for repairs. Therefore, liens for assessments of repairs under the bill may be subject to challenge.

²⁷ Recently, a trial judge ruled that mortgages had priority over code liens, regardless of the language of the ordinance authorizing the lien. The case is currently on appeal in the Fifth District Court of Appeal. *See City of Palm Bay v. Wells Fargo Bank, N.A.*, Case No. 5D09-1810 (Fla. 5th DCA 2010). In this case, the city argues that nothing in its ordinance which declares that municipal code enforcement liens are coequal with tax liens and superior in dignity to all other liens is expressly prohibited by the U.S. or Florida Constitutions.

Finally, the due process clause of the Fourteenth Amendment to the U.S. Constitution prohibits interference with an individual's liberty interest without due process of law. The provisions of the bill allowing governmental officials to enter property for the purposes of making emergency repairs may face constitutional challenge. However, the notice provisions to violators, as well as the government's interest in the health and safety of its citizens, may diminish the validity of a challenge.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill may have a positive impact on the private sector through greater certainty and notice of governmental liens. Lenders may be adversely impacted by the imposition of special assessments for costs.²⁸

C. Government Sector Impact:

There does not appear to be a direct fiscal impact on state government.

The Clerks of Court may experience increased revenue attributed to increased filings of liens.

Local governments may experience a positive impact due to expanding the authority to assess costs for repairs and permitting the recovery of costs ahead of foreclosure and other liens, and without the homestead restriction. However, any positive impact may be partially offset by increased administrative costs and recording costs, as well as costs associated with organizing and recording existing liens.²⁹

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

²⁸ The Real Property, Probate, and Trust Law Section of the Florida Bar, *supra* note 7, at 4.

²⁹ *Id.*

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.
